CAUSE NO. 03-15-00783-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

WALLACE L. HALL, JR., in his official capacity as a Regent for The University of Texas System,
Appellant,

v.

WILLIAM H. MCRAVEN, in his official capacity as Chancellor for The University of Texas System,
Appellee.

On Appeal from the 200th District Court of Travis County, Texas
The Honorable Scott Jenkins, Presiding

Brief of University of Texas Regents Alex M. Cranberg and Brenda Pejovich, and former Chairmen of the University of Texas Board of Regents Charles Miller and Wm. Eugene Powell as Amici Curiae Supporting Appellant Wallace L. Hall, Jr.

Jeremy C. Martin

MALOUF & NOCKELS LLP

3811 Turtle Creek Blvd., Suite 800
Dallas, Texas 75219
Phone: 214-969-7373
Fax: 214-969-7648

IDENTITY OF PARTIES AND COUNSEL

Appellant/ Plaintiff: **Wallace L. Hall, Jr.**

Counsel of Record:

Joseph R. Knight
SBN: 11601275
LAW OFFICE OF JOSEPH R. KNIGHT
111 Congress Ave., Suite 2800
Austin, Texas 78701
Telephone: (512) 457-0231
Facsimile: (512) 684-7681
jknight@knighttxlaw.com

Appellee/Defendant: **William H. McRaven**

Counsel of Record:

Patton G. Lochridge
SBN: 12458500
Richard D. Milvenan
SBN: 14171800
Blaire A. Knox
SBN: 24074542
MCGINNIS, LOCHRIDGE & KILGORE
600 Congress Ave., Suite 2100
Austin, Texas 78701
Telephone: (512) 495-6044
Facsimile: (512) 505-6344
plocbridge@mcginnislaw.com
rmilvenan@mcginnislaw.com
bknox@mcginnislaw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law:

Statutes:

Secondary Sources:

STATEMENT OF INTEREST AND TEX. R. APP. P. 11(c) DISCLOSURE

Amici Curiae are University of Texas Regents Alex M. Cranberg and Brenda Pejovich, and former Chairmen of the University of Texas Board of Regents Charles Miller and Wm. Eugene Powell, *i.e.*, "school officials" for purposes of 20 U.S.C. § 1232g(b)(1)(A). *Amici Curiae* paid the fee for preparing this brief.

Regent Alex M. Cranberg

In February 2011, Regent Cranberg was appointed to a six-year term on The University of Texas System Board of Regents. Accordingly, Regent Cranberg shares the same fiduciary duties as Appellant Regent Hall. *See* Tex. Educ. Code § 51.352(e). Regent Cranberg is also Chairman of the Health Affairs Committee and serves as a member of the Academic Affairs Committee, the Facilities Planning and Construction Committee, and the Technology Transfer and Research Committee.

In July 2014, Regent Cranberg was named as Chair of the newly-created University Lands Advisory Board. He previously served as Chairman of the Facilities Planning and Construction Committee. Regent

Cranberg also serves as a member of the MD Anderson Services Corporation Board of Directors and on the Texas Medical Center Board.

Regent Cranberg is Chairman of Aspect Holdings, LLC. He graduated Summa Cum Laude from The University of Texas at Austin in 1977 with a BS in Petroleum Engineering and received an MBA from Stanford University in 1981. After leading General Atlantic Partners' oil and gas investment activity from 1981-1992, Regent Cranberg founded Aspect Energy.

Regent Brenda Pejovich

Regent Pejovich was appointed to The University of Texas System Board of Regents by Governor Rick Perry in July 2010 and was reappointed in February 2011. Accordingly, Regent Pejovich shares the same fiduciary duties as Appellant Regent Hall. *See* Tex. Educ. Code § 51.352(e). Regent Pejovich is Chairman of the Facilities Planning and Construction Committee and serves as a member of the Academic Affairs Committee; the Audit, Compliance, and Management Review Committee; and the Technology Transfer and Research Committee.

Regent Pejovich is a Regental representative on the Board for Lease of University Lands. She previously served as Chairman of the Audit, Compliance, and Management Review Committee and served on the

Presidential Search Committees of U. T. Austin and U. T. Health Science Center—Houston. Regent Pejovich was Chairman of the Task Force on University Excellence and Productivity, and also Chairman of the Advisory Task Force on Best Practices Regarding University-Affiliated Foundation Relationships.

Regent Pejovich is founder of BFG Mgmt. Co. and Brenda Pejovich Group LLC. Previously, she was CEO of Brenda Pejovich & Associates Inc., a large-scale operations consulting firm ranked by the Dallas Business Journal as one of the top 25 largest firms in its sector.

Regent Pejovich's public service record includes gubernatorial appointments to the Texas Higher Education Coordinating Board, the Texas Building and Procurement Commission, and Texas Mutual Insurance Company. She currently serves on numerous boards, including the Texas Public Policy Foundation. Regent Pejovich is co-founder of the Professor Svetozar Pejovich Future Leaders Award for undergraduate economics students and a prime sponsor of the World War II Memorial located on the Capitol grounds in Austin, Texas.

Former Chairman Charles Miller

Former Chairman Miller was appointed to a six-year term of The University of Texas System Board of Regents by Governor George W. Bush in February 1999. He served as Chairman of the Board from April 30, 2001, until June 2, 2004.

Former Chairman Miller is also Chairman Emeritus and a member of the board of directors of the Greater Houston Partnership, the largest business organization in Texas. He served on the board of directors of the Governor's Business Council, the James B. Hunt, Jr., Institute for Educational Leadership and Policy, the Texas Medical Center, the Financial Foundation for Charter Schools of Texas, and the Texas Water Foundation.

Former Chairman Miller has been active in numerous other civic, educational, and business organizations. He has been a member of the Board of Visitors of The University of Texas M. D. Anderson Cancer Center, an advisory committee of the U. S. Securities and Exchange Commission, and the boards of the Houston Hispanic Chamber of Commerce, among many others. Former Chairman Miller was also a member of the Council of Overseers of the Jesse H. Jones Graduate School at Rice University; advisory

trustee of the Houston Ballet Foundation; and a member of the Governor's Task Force on State Trust and Asset Management.

Former Chairman Miller is a former Chairman of the Texas Educational Economic Policy Center; the Governor's Select Committee on Public Education; the Capital Formation Committee of the Governor's Task Force on Texas Business Development and Jobs Creation; the Texas State Pension Review Board; the University of Houston Foundation; and the Downtown Houston Management District.

Former Chairman Miller has decades of experience in a wide range of governance of public and private organizations. In addition to serving as Chairman of the Board of Regents of the U.T. System and other organizations, he served as Chair of a commission, "A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education," commonly called the Spellings Report, or "A Test of Leadership. Charting the Future of U.S. Higher Education." In 2013-14, Former Chairman Miller served as a member of a "National Commission on College and University Board Governance," organized by the Association of Governing Boards.

Former Chairman Wm. Eugene Powell

Former Chairman Powell was appointed to a six-year term on The University of Texas System Board of Regents by Governor Rick Perry in February 2009. He served as Chairman of the Board from February 8, 2011 through August 22, 2013.

Former Chairman Powell served as a member of the Special Advisory Committee on the Brackenridge Tract that was created in August 2009. He also serves on the Facilities Planning and Construction Committee, the Finance and Planning Committee, the Health Affairs Committee, as the Regental Representative on the Texas Growth Fund Board of Trustees, and as the Special Liaison on South Texas Projects.

Former Chairman Powell is a member of the Real Estate Council, the Greater San Antonio Builders Association, the San Antonio Hispanic Chamber of Commerce, the Greater Chamber of Commerce of San Antonio, and is a National Council Member of the Aspen Music Festival and School. He is the founder of the Responsible Growth Alliance. He has served on the Executive Committees of the Hispanic Chamber of Commerce and Los Compadres de la Missiones as well as the Executive Board of the Witte

Museum in San Antonio. In addition, he has chaired numerous successful fundraising events for various nonprofit organizations in San Antonio.

Amici Curiae emphasize that a regent should not have completely unfettered access to data and documents containing personally identifiable student information. However, the resolution of this dispute should begin with the fundamental presumption of openness. *See Envoy Med. Sys., L.L.C. v. State*, 108 S.W.3d 333, 336 (Tex. App.—Austin 2003, no pet.) ("As parties seeking to withhold information from the public, appellants have the burden to prove that an exception to disclosure applies to the information at issue."). As the Attorney General has put it, "This notion of openness is the foundation for Texas open government laws." CR:1049. This presumption of openness applies even more so in the context of a regent statutorily charged with "the legal responsibilities of a fiduciary" in controlling and managing an educational institution. *See* Tex. Educ. Code § 51.352(e).

Moreover, *Amici Curiae* submit that the Family Educational Rights and Privacy Act of 1974 ("FERPA") does not trump the need for individual regents to have access to such information for purposes of fulfilling their duties and responsibilities as Regents of the UT System.

ISSUE PRESENTED

> Whether FERPA supports a university's refusal to permit a university official charged with governing the university to review personally identifiable student information underlying the conclusions of a third-party investigation into admissions improprieties.

STATEMENT OF FACTS

Pursuant to Tex. R. App. P. 9.7, Amici adopt Appellant's Statement of Facts.

SUMMARY OF THE ARGUMENT

In this case of first impression, the UT System has invoked the "We can't release that information because of FERPA" response to a regent's request for information as part of the regent's statutory duties in setting campus admission standards and assuring that the admissions process is not self-serving to university employees in a position of influence. Student privacy protection claims—whether under FERPA or common law—should be considered in the context of the application of Regents' Rules, particularly when those Rules are used to further restrict individual Regental access to educational information with student identifying information. Here, at the very same time that Regent Hall's access to FERPA *and non-FERPA information* was being restricted, the Regents Rules were abruptly changed

to prevent access to student identifying information in the absence of a majority vote by the Regents.

While universities' misapplications of FERPA to avoid disclosing negative or embarrassing information to the press have become increasingly common over the past several decades, this is the first time an educational institution has invoked FERPA against its very own *regent*. This Court should not permit the UT System to misuse a statute intended to protect students—whose interests are undeniably affected by admissions standards—and refuse to give a regent information that has already been collected and reviewed by a third-party investigatory organization.

An individual regent has numerous legitimate educational purposes for examining personally identifiable student information. Even without the confirming vote of other members of the Board of Regents, there should be a heavy burden placed on the UT System to deny such access. And when, as here, the individual regent receives support of other regents, the system's burden should increase accordingly.

University and university system officials "have to be skeptical of everything [they] hear and be willing to look behind what people tell [them]

and take a hard look at everything. . . . I mean, everything."[1] As one commentator put it:

> We all go along. What a chilling indictment of our colleges and universities. It is sadly ironic that institutions whose reason for being is to search for truth are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment [FERPA].[2]

[1] Scott Charton, *Clemons Path Fraught With Dubious Grades*, Columbia Missourian, Aug. 31, 2003.

[2] *See* Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 Wis. L. Rev. 1053, at 1115.

ARGUMENT

A. A regent's access to personally identifiable student information cannot be subject to the UT System's blanket denial.

1. The UT System's FERPA determination was erroneous.

The threshold issue is undisputed: a regent has "the absolute right to review any information that he requests unless review of that information is prohibited by law." RR2:107. So, unlike the position taken by the UT System regarding its own discretion, a regent's entitlement to review information is circumscribed by limits, *i.e.*, if it is prohibited by law.

With that as the acknowledged standard, the UT System—which was established by the Board of Regents[3]—contends that it has the blanket discretion to decide that a regent has no legitimate educational interest in information unless that regent jumps through certain hoops that may be impossible to clear in the absence of access to the ostensibly prohibited information. But it is the *regents* who have been statutorily "authorized and directed to govern, operate, support, and maintain" the UT System. *See* Tex. Educ. Code § 65.31(a). "The government of the university system is vested in a board of nine regents appointed by the governor with the advice and

[3] Tex. Educ. Code § 65.16(a).

consent of the senate." *See* Tex. Educ. Code § 65.11. For a regent's access to information to be subject to the UT System's blanket discretion is counter to the statutory framework set up in Chapter 65 of the Education Code.

Equally troublesome is the UT System's process—which, "is not intended nor will it be implemented"[4] to prevent a regent from access to information—in deciding that Regent Hall had no legitimate educational interest in the Kroll records:

a. The UT System reviewed "not very much" of the Kroll records before deciding Regent Hall had no legitimate educational interest in them (RR3:40);

b. The UT System's general counsel did not "personally" review *any* of the Kroll documents before invoking FERPA (RR3:40-41);

c. The UT System's general counsel was "not positive" how much of the Kroll records had been reviewed by "staff attorneys" before the System invoked FERPA (RR3:41);

d. Chancellor McRaven has *never* reviewed the Kroll records (RR3:43); and

e. No individual has reviewed all of the Kroll documents (RR3:43).

The System's own pace of reviewing the Kroll documents should not prevent an individual Regent from conducting a faster or more incisive level

[4] Regents' Rule 10801 § 5.4.1.

of due diligence than any System employee feels is necessary, especially with regard to an issue of great interest to student access and admissions.

Notably, the Attorney General has addressed a potential "erroneous [FERPA] determination" by a university in the context of a Chapter 552 request. *See* Open Records Decision 634. In that decision, the Attorney General concluded that a school district was not required to request an Attorney General opinion before withholding information under the auspices of FERPA. However, the Attorney General cautioned that if the school district did not request a decision and made an "erroneous determination that the information is protected by FERPA, the [openness] presumption of section 552.302 will attach to the information."

Decision No. 634 expressly contemplates that upon the showing of a school's erroneous FERPA determination, a presumption of openness attaches. Implicit in that is the prospect that a requestor can make such a showing.

Here, the UT System could have sought an Attorney General decision regarding whether Regent Hall had a legitimate educational interest in the Kroll Documents, but the UT System chose not to do so. *Amici* submit that under Decision 634, the UT System's erroneous determination that Regent

Hall did not have a legitimate educational interest in the Kroll documents results in a presumption of openness.

2. A regent has a responsibility to insure that noncompliance with admissions standards is not the result of malfeasance by University employees.

The UT System makes much of the fact that it has made available redacted versions of a small number of Kroll documents that do not include students' personal information. However, the record reflects that the UT System made the decision that Kroll needed students' personal information to perform its investigation. RR2:123. And the UT System admitted that one cannot tell from the redacted versions of the Kroll documents whether a student is qualified for admission. RR3:61.

But whether an unidentified student is qualified for admission is not necessarily the only relevant point of inquiry for a diligent and devoted regent. As Kroll observed, the UT System acknowledged that there were "disparities in admission rates [that] could not reasonably be explained." CR:67. Kroll then notes that despite those disparities, the UT System ultimately concluded that "further investigation was deemed unwarranted." CR:67. This passive voice statement begs the question as to who deemed any further investigation unwarranted and on what basis.

A regent is responsible for ensuring that noncompliance is not the result of malfeasance, and a regent cannot and should not assign this responsibility to another entity, *e.g.*, Kroll. For example, a Regent would need a student's personally identifiable information to assess whether there is reasonable cause to believe that applicant's designation as a "hold" or a "must have" applicant has an appearance of personal aggrandizement. Simultaneous personal favors granted by a political figure or a personal relationship of the lesser-qualified applicant to the decision-maker could threaten the good name of the University, as opposed to the special admissions treatment being related to a relationship with a significant UT System donor or a student of special qualification. It is an individual Regent's job to call for further investigation if there is the appearance of such management impropriety and to call for appropriate disciplinary action. With these sort of stakes at play, the determination that there was no legitimate educational interest was an abuse of discretion.

B. The Family Educational Rights and Privacy Act of 1974

The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, also known as the Buckley Amendment, prohibits the federal funding of educational institutions that have a policy or practice of releasing

education records to unauthorized persons. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002). An educational agency or institution that unlawfully releases a student's record may lose federal funding. 20 U.S.C. § 1232g(b)(1). This is the only express remedy provided in the statute.

FERPA may be boiled down to "four essential requirements"[5]:

(i) Parents/adult students have the right to access their own education records (*see* 20 U.S.C. § 1232g(b)(l)-(2));

(ii) Generally, with exceptions, schools cannot disclose education records or their contents to third parties without the written consent of the parent/adult student (*see* 20 U.S.C. § 1232g(b)(1));

(iii) Parents/adult students who believe their education records are inaccurate or invasive of privacy have the opportunity for an internal and informal hearing; (see 20 U.S.C. § 1232g(a)(2)); and

(iv) Schools provide parents/adult students with an annual notice of their FERPA rights (see 20 U.S.C. § 1232g(d)).

Senator James L. Buckley of New York was the architect of FERPA. *See* Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75, 82 (2011). Buckley's goal was to provide students and their parents with ready access to students' education records to ensure two things:

[5] *See* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 Cath. U. L. Rev. 59 (2009).

(i) that the records were complete and accurate, thereby ensuring proper decisions would be made about the student's academic and vocational future; and

(ii) that schools would not carelessly release these otherwise secret files to third parties, particularly government agencies, revealing academic-related information that was deemed private.

Id. at 86. Buckley believed that FERPA would take the "lid off secrecy in our schools." *See* 120 Cong. Rec. 13,952 (1974).

Significantly, the legislative intent behind FERPA indicates that the statute is "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39,862 (1974). While FERPA speaks in terms of "disclosure" of personally identifiable student information, its exceptions reflect that the chief FERPA concern is the *use* of that information. *See* 20 U.S.C. § 1232g(b) and (h)-(j); 34 C.F.R. § 99.31. Simply granting Regent Hall access to the Kroll documents does not implicate any use—or misuse—of private information.

Importantly, Regent Hall has demonstrated appropriate use of personally identifiable student information in the past. For example, it was Regent Hall's receipt of documents—including personally identifiable information—that revealed a "very strong appearance" (RR2:73) of admissions improprieties. RR2:72-76. The UT System has never challenged

Regent Hall's use of that information, and in fact ultimately partially relied on it in ordering the Kroll investigation. RR2:72-76.

Amici emphasize that in the instant case, Regent Cranberg and Regent Pejovich supported Regent Hall's request in a recorded vote. While this support should not have been required for Regent Hall to gain access to the Kroll documents, it does further demonstrate a legitimate educational purpose as opposed to a narrow or personal purpose.

Amici do not necessarily share or even know about all of Regent Hall's present specific concerns but believe that his use of information requests has historically been based on good faith concerns about various serious issues for which exposure has led to important improvements in University policy. There is no reason to prevent Regent Hall—and potentially other current and future Regents—from having reasonably assured access to the information that may be needed to do their jobs as specified, authorized, and *required* by Chapter 65 of the Texas Education Code.

Amici emphasize that two chapters of the Education Code address boards of regents of state-owned universities: Chapter 51 and Chapter 65. *See* Tex. Educ. Code Ann. Chapters 51, 65. Chapter 51 is "generally applicable to higher education," while Chapter 65 applies specifically to the

"Administration of the University of Texas System." Unlike Chapter 51's provisions applicable to regents generally, Chapter 65 expressly "direct[s]" UT Regents to "operate" the UT System. *See* Tex. Educ. Code § 65.31(a). Thus, UT Regents have not only a general fiduciary duty regarding the UT System, but an additional statutory obligation to operate it. UT Regents are given broad authority for oversight of the UT System that is not shared by regents of other state-owned universities.

C. Educational institutions have misused FERPA as a basis to refuse to disclose information.

In 2008, Frank LoMonte, the executive director of the Student Press Law Center (SPLC),[6] opined that there was a "severe overcompliance issue" with universities and FERPA. *See* Lee Rood, *U of I Wants Clarification After Request for Records*, Des Moines Register (Oct. 22, 2008), http://pqasb.pqarchiver.com/desmoinesregister/access/1695736511.html?FMT=ABS&FMTS=ABS:FT. The SPLC cited as examples of FERPA abuse the University of Wisconsin's withholding of minutes from public meetings and a number of universities' refusals to release the names of recipients of free

[6] The SPLC devotes a portion of its website to educating student journalists about FERPA and open records laws.

football tickets. *See FERPA and Access to Public Records*, Student Press Law Ctr., http://www.splc.org/pdf/ferpa_wp.pdf (last visited May 16, 2016).

FERPA's drafter Buckley characterized the approach that schools have adopted as follows: "Things have gone wild . . . . One likes to think common sense would come into play. Clearly, these days, it isn't true." *See* Jill Riepenhoff & Todd Jones, *Secrecy 101: A Dispatch Investigation Shows Many College Athletic Departments Nationwide Use a Vague Federal Law To Keep Public Records from Being Seen*, Columbus Dispatch, May 31, 2009. Buckley has subsequently faulted institutions for "putting their own meaning into the law." *Id*.

1. Courts have stepped in to correct FERPA abuses.

While *Amici* are unaware of another instance in which a university has invoked FERPA against one of its own regents, some of the more well-known FERPA abuses by schools have involved university athletics and student athletes. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1205 (Fla. Dist. Ct. App. 2009); *Kirwan v. The Diamondback*, 352 Md. 74, 91, 721 A.2d 196, 204 (1998).

FERPA has also been invoked in the context of admissions scandals. In *Chicago Tribune Co. v. Univ. of Illinois Bd. of Trustees*,[7] the Chicago Tribune published a series of articles about admission practices at the University of Illinois. 781 F. Supp. 2d at 673. The so-called "Clout Goes to College" series included a list of applicants, known as "Category I," which included the relatives of certain influential individuals. *Id*. As the court put it: "Some of these applicants appeared to have received preferential treatment in the admissions process." *Id*.

In response to an open records request by the Tribune, the University invoked FERPA. *Id*. at 674. The court rejected the University's claim using reasoning similar to that put forward by Regent Hall in his Appellant's Brief:

> FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I. Illinois could choose to reject federal education

[7] 781 F. Supp. 2d 672, 673 (N.D. Ill. 2011) vacated sub nom. *Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) (reversing the court of appeals on jurisdictional grounds).

> money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything.

Id. at 675.

Allegations of misconduct are often met with the "We can't release that information because of FERPA" excuse. This excuse is particularly in-apropos in response to the request of, not a press organization, but a *university regent* seeking access to information that: (1) has already been collected and is currently accessible, (2) has already been reviewed by a third-party investigatory entity, (3) pertains to the regent's statutory duty regarding admissions standards,[8] and (4) the regent is prohibited by the Texas Penal Code from disclosing.[9]

Regent Hall's request for access to the documents underlying the Kroll Report is akin to a request for underlying data and foundations for an expert's opinion. Texas Rule of Civil Procedure 192.3(e), which defines the scope of permissible discovery from experts, provides in part as follows:

> A party may discover the following information regarding a testifying expert . . . :
>
> * * *

[8] *See* Tex. Educ. Code § 51.352(d)(4).

[9] *See* Tex. Pen. Code § 39.06.

> (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
>
> * * *
>
> (6) *all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony*; . . . .

Tex. R. Civ. P. 192.3(e) (emphasis added). In *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007), the Supreme Court of Texas weighed the "important interests the expert-production requirement was designed to serve" against the work-product privilege, ultimately concluding that the former trumped the latter:

> [T]he expert witness paints a powerful image on the litigation canvas. And it is typically the hiring attorney who selects the materials that will provide color and hue. Just as a purveyor of fine art must examine the medium used in order to distinguish masterpiece from fake, a jury must understand the pallet from which the expert paints to accurately assess the testimony's worth. Given the importance that expert testimony can assume, the jury should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion.

Id. at 440.

The UT System has objected to the production of the Kroll documents on the basis that they contain personal information, analogous to a privilege. But Kroll essentially functioned as an expert witness, with the UT System in the role as the hiring attorney. "Just as a jury must understand the pallet from which the expert paints to accurately assess the testimony's worth," Regent Hall is entitled to the "documents and tangible things" provided to Kroll that might have influenced its report.

2. Scholars and commentators have noted the trend of school abuses of FERPA.

Not only have courts curbed FERPA abuses, but scholars have also criticized universities for using FERPA to hide negative information under the pretense of protecting student privacy. *See* Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 Cardozo L. Rev. 1555, 1556–57 (2012) ("The goal is nondisclosure. The chorus is student privacy. The tool: the FERPA defense."); Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 Wis. L. Rev. 1053, at 1112 ("It is sadly ironic that

institutions whose reason for being is to search for truth are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment [FERPA].").

D. The legal and administrative interpretations of FERPA do not support the UT System's extraordinary invocation of this law.

As referenced above in the Statement of Interest, Texas applies a presumption of openness, which *Amici* submit is even stronger in the case of a regent's request to view information relating to admissions. But the instant case presents an even more compelling case for openness in light of the fact that Regent Hall received the required votes necessary to view the documents under the rules in effect at the time. CR:862. The UT System is absolutely entitled to give Regent Hall access to the Kroll documents on the facts of this case.

1. FERPA is directed to institutional breakdowns, not one-time disclosures.

Importantly, FERPA is not violated unless a school has a "policy or practice of permitting the release of education records" without parental consent. 20 U.S.C. § 1232g (b)(1). A single instance of releasing records without parental or student consent (which is all that is alleged here) is not a violation of FERPA. *See, e.g.*, *Com. v. Buccella*, 434 Mass. 473, 483, 751 N.E.2d 373, 382 (2001); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45

F.Supp.2d 664, 674 (D. Minn. 1999) (finding no FERPA violation where plaintiff alleged only one incident of school releasing records without parental consent).

By its plain language, FERPA declares an educational institution ineligible for all federal education funding if it maintains a "policy and practice" of disclosing students' confidential education records. 20 U.S.C. § 1232g(b)(1). Most courts have decided that FERPA means what it says: it penalizes only an institutional breakdown in recordkeeping, not a one-time decision to honor a records request in compliance with state law. Indeed, the DOE itself took the position, when sued over its now-discredited interpretation that police crime reports were "education records," that FERPA does not override or excuse compliance with state freedom-of-information laws, but merely "makes disclosure financially unattractive(.)" *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1232 n.13 (D.D.C. 1991).

FERPA is about the duty to enforce a pattern and practice of confidentiality—that is, a duty not to make a habit of disclosing students' education records. This is much different from the UT System's current notion of FERPA as a one-strike-and-you're-out regime in which a single

fulfilled public-records request by a regent can be fatal to the institution's existence.

2. Disclosure of the information requested by Regent Hall will not result in the shuttering of the UT System.

To suggest that Congress could have intended to close an educational institution because of a single good-faith grant of a request for public records is absurd. Congress intended FERPA to penalize only the rare outlier institution that wantonly makes a practice of handling student records carelessly. Otherwise, Congress would have provided milder intermediate penalties, as it has with comparable education funding statutes. *See* Department of Education, *Adjustment of Civil Monetary Penalties for Inflation*, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 C.F.R. Part 36) (specifying range of civil penalties for violating statutes administered by the Department of Education, all but one of which is capped at $35,000 per violation).

It is nonsensical that the penalty for falsifying a crime report to mislead the public is an offense carrying a penalty of no more than $35,000, while the penalty for granting a regent's request to view personally identifiable student information in the course of evaluating admissions improprieties

could result in the wholesale disqualification from federal education funding. "For the penalty structure to make any sense, a FERPA violation must necessarily be of the magnitude of a total institutional breakdown in security, not a one-time decision made in good-faith reliance on controlling state disclosure laws." *See* Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 Geo. L. J. 493, 498 (January 2013).

FERPA and the Department of Education's FERPA rules say this extreme remedy—which has never been used in the 40-year history of FERPA—is proper only if the school cannot be brought into voluntary compliance with the law. The Department has issued some 150 letter notices alerting schools to potential FERPA violations, yet has never financially penalized any of them.

http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/ferpa_wp.pdf.

That the UT System would become FERPA's first victim based on disclosure of personally identifiable information to a regent charged with setting admission standards and maintaining the confidentiality of that information is highly unlikely. The Court should view the UT System's plea of student privacy accordingly.

3. Regents—and school officials generally—have a legitimate educational purpose vis-à-vis admissions standards.

FERPA permits the disclosure of personally identifiable information without student consent when others have a need to know because of their professional capacities, such as other school officials who have a "legitimate educational interest," government representatives, or individuals conducting institutional accreditation surveys. *See* 34 C.F.R. § 99.31(a); FERPA, 76 Fed. Reg. at 75,641–42. Yet the UT System's position would seem to suggest that it must replace student names with anonymizing codes for even officials conducting accreditation surveys since there is far less reason for these officials to know actual names than for a regent trying to understand why admissions standards were violated.

During the hearing on the UT System's motion to dismiss, the UT System stipulated that the dispositive issue here is "whether as a matter of law [the UT System] is right on FERPA that there's no legitimate educational need for this individual regent to see that material." RR4:55 ("MR. MILVENAN: Yes, Your Honor."). The record reflects that the UT System agreed that the Board of Regents had a legitimate educational interest in the topic that Kroll was going to investigate—*i.e.*, undue influence in the

admissions process. RR2:119.[10]

That a regent has a legitimate educational interest in personally identifiable information for purposes of admission standards and for assuring that UT's employees are behaving in an honest and above-board way should be unquestionable, but the UT System has taken the novel position that Regent Hall does not have a legitimate educational interest. By way of illustration, a frequently referenced example of a situation where a student's privacy rights are violated by disclosure of personally identifiable information to a school official involves a student's concerns that her ex-husband, a school official, intends to use her educational record in a custody battle. The response by the American Association of Collegiate Registrars and Admissions Officers ("AACRAO")[11] was as follows:

> We, of course, would agree that this is a violation of a student's FERPA rights. It is also an example of a school official (the ex-husband) obtaining an education record without a legitimate educational

[10] The UT System further admitted that it could not compare students' qualifications for admission based on redacted information provided in the spreadsheet offered to Regent Hall. RR3:61-62.

[11] Founded in 1910, the AACRAO is a nonprofit association of more than 2,600 institutions of higher education and more than 10,000 enrollment officials. AACRAO represents campus professionals in admissions, enrollment management, academic records, and registration. Because they work with sensitive information contained in educational records, members of the AACRAO are directly responsible for protection of privacy of applicants, students, and former students.

> interest. This was a serious violation of FERPA that could have had serious legal implications for the university. The lesson to be learned is that there needs to be a continuous attempt to inform all school officials, new and old, on their FERPA responsibilities. FERPA is an Act that involves any employee who comes in contact with education records at any institution.

http://www-local.legal.uillinois.edu/ferpa06/FERPA2006_Chapters5-6.pdf at 70-71. So while the UT System's refrain—*i.e.*, that status as a school official alone does not satisfy FERPA—is true enough, the above example demonstrates the sort of instance in which a school official truly has no legitimate educational interest. It is, of course, a far cry from Regent Hall's legitimate educational interest in the materials reviewed by Kroll concerning admissions standards and practices, as well as admissions that occurred outside the publicly stated admission practices of UT Austin.

E. Expedited Consideration

Amici Curiae further urge the Court to grant Appellant's Unopposed Motion for Expedited Consideration. In addition to the reasons outlined in Appellant's motion, FERPA disputes are generally fraught with delay:

> The main result of the current state of FERPA compliance is that information that universities are legally required to release under state open records laws often becomes public only after a long delay—

> if at all. Litigation, even when the issues of law are clear, can be a lengthy process.

See Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 Geo. L. J. 493, 506 (January 2013).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for all of the reasons briefed and set forth herein and in the interest of justice and fairness, *Amici Curiae* respectfully request that the Court sustain Regent Hall's issues regarding FERPA and hold that the statute does not provide the UT System with the sole and unreviewable discretion to decide that a school official has no legitimate educational interest in personally identifiable student information.

Respectfully submitted,

/s/ Jeremy C. Martin
Jeremy C. Martin
Texas State Bar No. 24033611
jmartin@smalouf.com

MALOUF & NOCKELS LLP

3811 Turtle Creek Blvd., Suite 800
Dallas, Texas 75219
Telephone: 214.969.7373
Facsimile: 214.969.7648

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 5,818 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Jeremy C. Martin
Jeremy C. Martin

CERTIFICATE OF SERVICE

In accordance with the applicable rules, the undersigned attorney hereby certifies that a copy of the foregoing instrument was served on all parties by way of email, facsimile, first-class mail, and/or certified mail return receipt requested on this the 26th day of May 2016.

Joseph R. Knight
EWELL, BROWN, BLANKE & KNIGHT LLP
111 Congress Avenue, 28th Floor
Austin, Texas 78701
512.770.4010
512.684.7681 (facsimile)

ATTORNEYS FOR APPELLANT

Patton G. Lochridge
Richard D. Milvenan
Kayla Carrick
MCGINNIS, LOCHRIDGE & KILGORE
600 Congress Ave., Suite 2100
Austin, Texas 78701
T: (512) 495-6005/F: (512) 505-6305

Wallace B. Jefferson
Amy Warr
ALEXANDER DUBOSE JEFFERSON &
TOWNSEND, LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
T: (512) 482-9300/F: (512) 482-9303

ATTORNEYS FOR APPELLEE

KEN PAXTON
Attorney General of Texas
JEFFREY C. MATEER
First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Litigation
NICHOLE BUNKER-HENDERSON
Chief, Administrative Law Division
KIMBERLY L. FUCHS
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167

ATTORNEYS FOR AMICUS CURIAE KEN PAXTON, ATTORNEY GENERAL OF TEXAS

/s/ Jeremy C. Martin
Jeremy C. Martin